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Supreme Court, U.S.
FILED
JAN 20 1995
OFFICE OF THE CLERK

No. 94-922

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER Term, 1994

PEOPLE OF THE STATE OF MICHIGAN,

Petitioner,

-v-

JAMES KING ANDERSON III

Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

AFFIDAVIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

PROOF OF SERVICE

STATE APPELLATE DEFENDER OFFICE

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Counsel for Respondent

No. 94-922

IN THE

SUPREME COURT OF THE UNITED STATES

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PEOPLE OF THE STATE OF MICHIGAN,

Petitioner,

-v-

JAMES KING ANDERSON III

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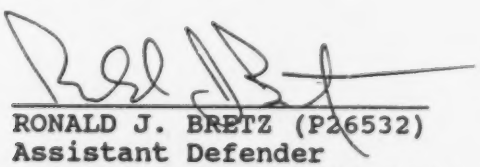
MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The respondent, JAMES KING ANDERSON III, who is now held in the Kinross Correctional Facility, asks leave to file the attached Brief in Opposition to a Petition for Writ of Certiorari to the Supreme Court of the State of Michigan without prepayment of costs and to proceed in forma pauperis pursuant to Rule 46.

The respondent's affidavit in support of this motion is attached hereto. Respondent has been represented by appointed counsel for all post-conviction proceedings. See attached Order.

STATE APPELLATE DEFENDER OFFICE



BY: RONALD J. BRETZ (P26532)
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(517) 334-6069

Counsel for Respondent

NO. 94-922

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OCTOBER Term, 1994

State of Michigan,

Petitioner,

v

James King Anderson III,

Respondent.

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED

IN FORMA PAUPERIS

I, James King Anderson III, being duly sworn, depose and say that I am the Respondent, in the above-entitled case; that in support of my motion to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress; and,

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

1. Are you presently employed? Yes ____ No ✓

a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of you employer.

b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received.

Jerry Long $ 600.00

2. Have you received within the past twelve months any income from any of the following sources?

a. Business, profession or form of self-employment?

Yes ____ No ✓

b. Rent payments, interest or dividends?

Yes ____ No ✓

c. Pensions, annuities or life insurance payments?

Yes ____ No ✓

d. Gifts or inheritances?

Yes ____ No ✓

e. Any other sources?

Yes ____ No ✓

If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months.

3. Do you own any cash or checking or savings account?

Yes ____ No ✓ (Include any funds in prison accounts.)

If the answer is yes, state the total value of the items owned.

4.78

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

Yes ____ No ✓

If the answer if yes, describe the property and state its approximate value.

5. List the persons who are dependent upon you for support, state your relationship to those persons, and indicate how much you contribute toward their support.

NONE

I understand that a false statement or answer to any question in the affidavit will subject me to penalties for perjury.

James K Anderson

James King Anderson III

SUBSCRIBED AND SWORN TO before me, this ____ day of _____, 1994

_____

Notary Public, _____ County, Michigan
My Commission Expires:

Subscribed and sworn before me, this ____ day of DEC 15 1994 a Notary Public in and for CHIPPEWA County Michigan.

James S Thornton

(Signature)
NOTARY PUBLIC

My Commission expires _____, 19__

JAMES S. THORNTON
NOTARY PUBLIC - CHIPPEWA COUNTY, MICH.
MY COMMISSION EXPIRES 06-03-96

JAMES S. THORNTON III NOTARY PUBLIC CHIPPEWA COUNTY

Approved, SCAO

Copies to: Trial Court, Court Reporter(s)/Recorder(s), Assigned Counsel, Defendant, Prosecutor, Court of Appeals, and MAACS

STATE OF MICHIGAN 46th JUDICIAL CIRCUIT KALKASKA COUNTY	ORDER REGARDING APPOINTMENT OF APPELLATE COUNSEL ~~AND TRANSCRIPT~~ ☒ Substitution of Counsel ☐ Order amended	CASE NO. 88-905 FC

Court address: P. O. Box 10, Kalkaska, MI 49646

Court telephone no.: 616/258-3300

People of THE STATE OF MICHIGAN

v

Defendant name, address, date of birth, and inmate no. (if known)
ANDERSON, JAMES KING, P200209
Kinross Correctional Facility
P. O. Box 171
Kincheloe, MI 49788 DOB: 10/22/57

OFFENSE NAME	MCL CITATION	SENTENCE(S)
CSC 1st	750.520B1A	50-75 years

1. On November 7, 1994 (Date) the defendant filed a request for appointment of counsel ~~and a declaration of indigency~~.

IT IS ORDERED:

☐ 2. Defendant's request for appellate counsel is denied because the ☐ request is untimely. ☐ defendant is not indigent.

☐ 3. ☒ The State Appellate Defender Office, Suite 3300 Penobscot Building, 645 Griswold, Detroit, MI 48226 (313) 256-9833

OR

☐ _____ (Name of Appellate Counsel) _____ (Address)

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STATE APPELLATE DEFENDER OFFICE

_____ (City, state, and zip) _____ (Telephone no.) _____ (Bar no.)

is appointed counsel for the defendant in post-conviction proceedings. If appointed counsel cannot or will not accept this appointment, counsel shall notify the court immediately.

4. The court reporter(s)/recorder(s) shall file with the trial court clerk the transcripts checked below and any other transcripts requested by counsel in this case not previously transcribed. Transcripts shall be filed within 28 days for pleas or 56 days for trials from the date ordered or requested. [MCR 7.210(B)] Reporter(s)/recorder(s) shall be paid as provided by law.

TRANSCRIPT ORDERED	REPORTER/RECORDER NAME, DESIGNATION, AND NUMBER		DATE(S) OF PROCEEDING
☐ a. Jury trial ☐ b. Bench trial ☐ c. Plea			
☐ Probation Violation ☐ d. Plea ☐ e. Hearing			
☐ f. Sentence ☐ g. Resentence			
☐ h. Other (specify)			

5. The clerk shall immediately send to counsel a copy of the docket entries and the transcripts ordered above or requested by counsel as they become available. The clerk shall also forward documents upon request by counsel. [MCR 6.433]

11/28/94 (Date)

X _____ Judge Alton T. Davis P24472 (Bar no.)

CERTIFICATE OF MAILING

☒ I certify that on this date I mailed a copy of this order appointing counsel on appointed counsel, defendant, court reporter(s)/recorder(s), prosecutor, Court of Appeals, and the Michigan Appellate Assigned Counsel System. I also mailed a copy of the defendant's request for appointment of counsel to appointed counsel, the prosecutor, and the Michigan Appellate Assigned Counsel System.

☐ I certify that on this date I mailed a copy of this order denying appointment of counsel on defendant, prosecutor, and the Michigan Appellate Assigned Counsel System. I also mailed a copy of the defendant's request for appointment of counsel to the prosecutor and the Michigan Appellate Assigned Counsel System.

11/30/94 (Date)

Phyllis Pyke (Signature)

No. 94-922

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER Term, 1994

PEOPLE OF THE STATE OF MICHIGAN,

Petitioner,

-v-

JAMES KING ANDERSON III

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
TO THE MICHIGAN SUPREME COURT

RESPONDENT'S BRIEF IN OPPOSITION

STATE APPELLATE DEFENDER OFFICE

BY: RONALD J. BRETZ (P26532)
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Counsel for Respondent

COUNTERSTATEMENT OF QUESTIONS PRESENTED FOR REVIEW

I. SHOULD THIS COURT DENY CERTIORARI WHERE THE MICHIGAN SUPREME COURT CORRECTLY HELD THAT RESPONDENT'S SIXTH AMENDMENT RIGHT TO COUNSEL WAS VIOLATED BY POST-ARRAIGNMENT, POLICE-INITIATED INTERROGATION EVEN THOUGH RESPONDENT WAS NOT IN CUSTODY AT THE TIME?

II. SHOULD THIS COURT DENY CERTIORARI WHERE THE MICHIGAN SUPREME COURT CORRECTLY HELD THAT THE POLICE INITIATED INTERROGATION WITHIN THE MEANING OF MICHIGAN V JACKSON, SUPRA?

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II. THIS COURT SHOULD DENY CERTIORARI WHERE THE MICHIGAN SUPREME COURT CORRECTLY HELD THAT THE POLICE INITIATED INTERROGATION WITHIN THE MEANING OF MICHIGAN V JACKSON, SUPRA. 6

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COUNTERSTATEMENT OF THE CASE

Respondent accepts Petitioner's statement with the exception of the following:

At the remand hearing ordered by the Michigan Supreme Court in this case, Detective Gaultier did not testify as to the exact date he contacted Respondent concerning the availability of a polygraph exam. Although the trial court found that this contact was made prior to Respondent's arraignment, there is no testimony to support this finding. (Remand Transcript 44-45, Respondent's Appendix, 44a-45a). The Michigan Supreme Court found that Detective Gaultier contacted Respondent after arraignment. (Petitioner's Appendix 17a)

REASONS FOR DENYING THE WRIT

I. THIS COURT SHOULD DENY CERTIORARI WHERE THE MICHIGAN SUPREME COURT CORRECTLY HELD THAT RESPONDENT'S SIXTH AMENDMENT RIGHT TO COUNSEL WAS VIOLATED BY POST-ARRAIGNMENT, POLICE-INITIATED INTERROGATION EVEN THOUGH RESPONDENT WAS NOT IN CUSTODY AT THE TIME.

Petitioner correctly notes this Court's holding in Michigan v Jackson, 475 US 625, 636; 106 SCt 1404; 89 LEd2d 631 (1986), that "if police initiate interrogation after a defendant's assertion, at an arraignment or similar proceeding, of his right to counsel, any waiver of defendant's right to counsel for that police-initiated interrogation is invalid." Petitioner then argues that this ruling, based on the Sixth Amendment, does not apply if the defendant is not in custody or if there has been a

break in custody between the arraignment and the subsequent interrogation. Petitioner's argument is incorrect; it is contrary to all of the prior Sixth Amendment decisions of this Court and it misperceives the protection afforded by the Sixth Amendment right to counsel.

All of the caselaw relied on by Petitioner to support his custody argument is based upon the Fifth Amendment. There is no question that the right to counsel created by this Court in Miranda v Arizona, 384 US 436; 86 SCt 1602; 16 LEd2d 694 (1966), applies only to a suspect who has not yet been charged with a crime and who is subjected to custodial, police interrogation. Accordingly, the Fifth Amendment decisions relied on by Petitioner also require that under Edwards v Arizona, 451 US 477; 101 SCt 1880; 68 LEd2d 378 (1981), a suspect who has advised the police that he wishes to consult with an attorney, cannot be subjected to further police-initiated interrogation as long as he remains in custody. See McNeil v Wisconsin, 501 US 171, 177; 111 SCt 2204; 115 LEd2d 158 (1991).

"Custody . . . is not controlling" in the Sixth Amendment context. Rhode Island v Innis, 446 US 291, 300, fn. 4; 100 SCt 1682; 64 LEd 2d 297 (1980). As this Court has stated, after the initiation of formal charges, the Sixth Amendment guarantees the accused "the right to rely on counsel as a 'medium' between him and the State." Maine v Moulton, 474 US 159, 176; 106 SCt 477; 88 LEd2d 481 (1985). This is because the Sixth Amendment right to counsel is more pervasive than the narrower Fifth Amendment

right created by the Miranda decision. Thus, even in the limited context of police questioning, the Sixth Amendment provides greater protection for an *accused* than the Fifth Amendment does for a *suspect*. For example, while the Fifth Amendment only provides a right to counsel when there is custodial police interrogation, the Sixth Amendment right to counsel applies whenever the State deliberately elicits inculpatory statements even when the accused is not in custody. Maine v Moulton, supra; Massiah v United States, 377 US 201, 206; 84 SCt 1199; 12 LEd2d 246 (1964); Brewer v Williams, 430 US 387; 97 SCt 1232; 51 LEd2d 424 (1977).

This Court's language in rejecting the State's argument in Jackson is applicable to the position advanced by the State in the instant case: "The State's argument misapprehends the nature of the pretrial protection afforded by the Sixth Amendment." Michigan v Jackson, 475 US at 631. In holding that a defendant who had exercised his Sixth Amendment right at arraignment was entitled to "at least as much protection" from police-initiated interrogation as that provided by Edwards v Arizona under the Fifth Amendment, this Court explained as follows:

> "Indeed, after a formal accusation has been made-and a person who had previously been just a "suspect" has become an "accused" within the meaning of the Sixth Amendment-the constitutional right to the assistance of counsel is of such importance that the police may no longer employ techniques for eliciting information from an uncounseled defendant that might have been entirely proper at an earlier stage of the investigation. Thus, the surreptitious employment of a cellmate, * * *or the electronic surveillance of conversations with third parties, * * * may violate the defendant's Sixth Amendment right to counsel even though the same methods of investigation may have been permissible before arraignment or indictment. Far from undermining the Edwards

> rule, the difference between the legal basis for the rule applied in Edwards and the Sixth Amendment claim asserted in these cases actually provides additional support for the application of the rule in these circumstances." *Id.*, at 632 (citations and footnote omitted).

Petitioner concedes that "few jurisdictions have addressed the issue of continuous custody in the Sixth Amendment context." *Petition For Writ of Certiorari*, at 18. This is an overstatement. In fact, no court has ever held that the Sixth Amendment right to counsel under Jackson requires continuous custody. Indeed, while Petitioner cites a Kansas Supreme Court decision as an example of a case that "applied a 'break in custody' exception to a Jackson rule analysis" *Id.*, at 19, Petitioner's statement is inaccurate. In State v Norris, 244 Kan 326; 768 P2d 296 (Kan 1989), the defendant had been brought to the police station and questioned regarding a murder. He invoked his right to counsel and was released without being charged. The following day, he was arrested and, prior to arraignment, was again given his Miranda rights and questioned. The defendant confessed to the murder. The Court held that the defendant's Sixth Amendment right to counsel had not attached on the murder because he had not yet been formally charged. The Court then found the confession admissible because the earlier invocation of the Fifth Amendment right had terminated when he was released from custody.

The Kansas Supreme Court cited with approval the Tenth Circuit's decision in United States v Geittman, 733 F2d 1419 (CA 10, 1984). In that case, the Court held that a post-arraignment statement obtained from a defendant released on bond violated his

Sixth Amendment right to counsel but not his Fifth Amendment right that had been invoked when he was originally taken into custody.

Accordingly, this Court should reject the State's invitation to impose a continuous custody requirement on the Sixth Amendment right to counsel. As this Court has noted, the purpose of the Sixth Amendment differs greatly from the purpose behind invocation of the Fifth Amendment right to counsel. The latter evidences a suspect's desire to deal with the police only through counsel. The purpose of invoking the Sixth Amendment right is to 'protec[t] the unaided layman at critical confrontations' with his 'expert adversary,' the government, *after* 'the adverse positions of government and defendant have solidified'." McNeil v Wisconsin, 501 US at 177-178. Respondent Anderson was entitled to the full protection of the Sixth Amendment when Detective Gaultier initiated the post-arraignment interrogation. That right was violated when Gaultier exploited the opportunity to confront Respondent in the absence of counsel. This Court should deny the writ.

II. THIS COURT SHOULD DENY CERTIORARI WHERE THE MICHIGAN SUPREME COURT CORRECTLY HELD THAT THE POLICE INITIATED INTERROGATION WITHIN THE MEANING OF MICHIGAN V JACKSON, SUPRA.

Respondent concedes that there is a difference of opinion as to when Detective Gaultier initially contacted Respondent about taking a polygraph examination. The trial court found that Gaultier contacted Respondent on May 25, 1988, the day *before* arraignment. (Petitioner's Appendix, 35a). The Michigan Supreme Court found that Gaultier contacted Respondent concerning the polygraph *after* arraignment and, therefore, after the appointment of counsel. People v Anderson (After Remand), 446 Mich 392, 401, 403-404; ___ NW2d ___ (1994). Petitioner, of course, relies on the trial court's finding and argues that Gaultier's contact with Respondent occurred prior to the attachment of the Sixth Amendment and, therefore, did not violate the bright-line rule of Michigan v Jackson.

The first problem with Petitioner's argument is that there is no testimony in the record as to exactly when Gaultier contacted Respondent. Gaultier testified at the remand hearing that it was on May 25, 1988, that he learned of the availability of a polygraph. However, he never said that his attempt to notify Respondent occurred the same day. Gaultier testified that he left a message at Respondent's house regarding the availability of a polygraph;

> "Q Okay. At what point did you find out that a polygraph would be available?
>
> A I believe it was on the 25th.

Q Two days later?

A Right.

Q And under what circumstances was that, then, communicated to Mr. Anderson?

A A message was left at the residence that he was staying at. I believe that was the Sue Rebone residence at that time.

Q And who left the message?

A I did, myself.

Q Did you speak directly with Mr. Anderson?

A No, I did not.

Q What type of message did you leave?

A I don't recall if -- if I left word with Sue Rebone, or if I left a handwritten message.

Q And what was, then, the content of the message?

A That -- I left him the date and time for the appointment for the polygraph examination, and, to contact me prior to that date and time, well in advance if he needed transportation to Gaylord.

Q And in response to that communication, did he, in fact, subsequently contact you?

A Yes.

Q When?

A I don't recall. It was prior to the scheduled polygraph appointment.

Q Do you know how much in advance of the scheduled polygraph, or how long after you had left the message?

A No, I do not." (Remand Transcript 44-45, Respondent's Appendix, 44a-45a).

Detective Gaultier was never asked when he contacted Respondent and he did not volunteer that information. Thus, there is

no basis in the record for the Petitioner's argument that the police initiation of communication with Respondent occurred before arraignment.

Moreover, even if Gaultier's contact was prior to arraignment, there is similarly no record of when Respondent responded to Gaultier's message. According to Gaultier's testimony quoted above, Respondent could also have contacted Gaultier prior to arraignment. If that was the case, the first post-arraignment contact would have been initiated by Gaultier when he went to Respondent's residence to drive him to the polygraph. If a bright line is drawn by the arraignment and attachment of the Sixth Amendment right to counsel, Gaultier crossed that bright line by seeking out Respondent to drive him to the post-arraignment polygraph. As the Michigan Supreme Court found, Gaultier's post-arraignment initiation of contact with Respondent, whether it was by leaving a message or picking him up for the trip to the polygrapher, was "...unquestionably in anticipation of further police interrogation, i.e., the polygraph examination and questioning thereafter." People v Anderson, 446 Mich at 404.

Despite the factual deficiencies in this record, it remains clear that Detective Gaultier initiated the post-arraignment, couselless interrogation that resulted in the admissions by Respondent. The initial conversations between Gaultier and Respondent concerned only the arrangements for the polygraph exam. As Petitioner correctly notes, such an exam is a matter of right under state law. Mich. Comp. Laws, §776.21(5). Even if

Respondent "initiated" contact with Gaultier by responding to Gaultier's message, that contact was limited to the polygraph arrangements. It certainly did not evidence an intent on Respondent's part to give up his previously invoked right to counsel. Even the waiver Respondent signed at the polygraph examination was, by its own terms, directed at the polygraph. (See Petitioner's Appendix at 53a-57a).

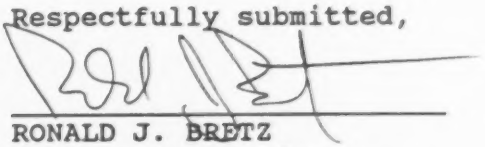
Detective Gaultier initiated interrogation during the drive home after the polygraph. According to the record, Gaultier began the conversation by telling Respondent that he wanted to speak with him regarding the charges. Gaultier then asked Respondent if he remembered the rights he had been given during the polygraph. Without again reading Respondent his rights, Gaultier began asking Respondent questions which resulted in the damaging admission.

This Court should recognize that even if Respondent initiated contact with Detective Gaultier for the purpose of arranging a ride to the polygraph, this contact was not an invitation to Gaultier to interrogate Respondent in the absence of counsel. Gaultier's clear initiation of post-arraignment interrogation violated the bright-line rule of Jackson v Michigan. For that reason, the decision of the Michigan Supreme Court is correct. This Court should deny the petition for writ of certiorari.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that this Honorable Court deny the petition for a writ of certiorari

Respectfully submitted,



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Counsel for Respondent

A P P E N D I X

STATE OF MICHIGAN

46TH JUDICIAL CIRCUIT COURT - KALKASKA COUNTY

THE PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SC: 95406
COA: 152135
LC: 88-905-FC

JAMES KING ANDERSON, III,

Defendant-Appellant.
_____/

EVIDENTIARY HEARING REGARDING SIXTH AMENDMENT RIGHT ON REHAND FROM THE SUPREME COURT

BEFORE THE HONORABLE ALTON T. DAVIS, CIRCUIT JUDGE

Grayling, Michigan - Thursday, May 12, 1994

APPEARANCES:

For the People:

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Grayling, Michigan.

Thursday, May 12, 1994 - 1:42 p.m.

COURT OFFICER: All rise, please. 46th Circuit Court for the county of Kalkaska is now in session; the Honorable Alton T. Davis, presiding.

THE COURT: Thank you. You may be seated. Court is in session. This is the matter of the People of the State of Michigan versus James King Anderson. Mr. Hackley, do you want to put an appearance on the record?

MR. MACKLEY: Good afternoon, your Honor. Mark Mackley appearing on behalf of the People.

MS. DAGHER-MARGOSIAN: I'm Jeanice Dagher-Margosian, your Honor, for Mr. Anderson.

THE COURT: Thank you. This matter is here on a remand from the Supreme Court for purposes of an evidentiary hearing, limited in nature to the inquiries that the Supreme Court has placed before the Court. How would you like to proceed in the matter?

MS. DAGHER-MARGOSIAN: Well, your Honor, Mr. Mackley and I have discussed it, and I believe that he can open questioning and I can cross-examine that witness. That would appear to be logical since they mandated this, if that would be agreeable to the Court.

THE COURT: It's all right with me.

MR. MACKLEY: I assume, Judge, that I have the

burden, here, so I was prepared to initiate the questioning.

THE COURT: All right. Do you wish to proceed with a statement, or do you want to proceed with your witnesses?

MR. MACKLEY: No, Judge, I've got a couple of -- I've got four witnesses present. I don't know whether I will call them all, but I don't have a statement. I'm just going to go ahead and call the witnesses.

THE COURT: All right. Your first witness?

MR. MACKLEY: Thank you, Judge. The People would first call to the stand, Michael McMasters.

THE COURT: All right. Mr. McMasters, if you will please come before the Clerk, sir, and raise your right hand, she'll swear you as a witness.

COURT CLERK: You do solemnly swear or affirm that the testimony you shall give in this matter now pending, will be the truth, the whole truth, and nothing but the truth, so help you, God?

MR. McMASTERS: I do.

THE COURT: Thank you.

(Witness takes stand; examination not started)

THE COURT: May I see counsel at the bench before we start this?

(At 1:43 p.m., bench conference held on the record,

not recorded)

(At 1:44 p.m., bench conference concluded)

THE COURT: Given the circumstances and the nature of the remand and the issues before the Court today; after colloquy with counsel and I understand the agreement of counsel, the Court is going to order that any prospective witnesses remain outside the courtroom until they are called to testify. And, I further order that any witnesses not discuss their testimony with the other witnesses, either before or after they give the testimony. Once a witness -- once a witness has testified, they may remain in the courtroom if they have any interest in the proceedings. So, I would ask any witnesses now to -- that are not presently called, to await the call --

MR. MACKLEY: Would that include, Judge, the officer in charge of the case?

THE COURT: Yes, I think under these circumstances, it would have to.

MR. MACKLEY: Okay. Thank you.

(Prospective witnesses exit the courtroom)

MR. MACKLEY: Are you ok-- are you okay hearing me, Marlene?

COURT RECORDER: Pardon?

MR. MACKLEY: Are you okay hearing me?

COURT RECORDER: Yeah, you're fine.

THE COURT: Now, your name again, sir? I'm sorry.

THE WITNESS: Michael McMasters.

THE COURT: You may proceed.

MICHAEL McMASTERS

called on behalf of the People at 1:43 p.m., and sworn by the Clerk, testified:

BY MR. MACKLEY:

Q Could you, again, state your name for the record?

A Michael McMasters.

Q All right. Where are you employed, sir?

A I'm employed at McMasters Cost Company.

Q All right. Where were you employed in June of 1988?

A Michigan State Police.

Q In what capacity?

A I was a polygraph examiner.

Q All right. In what -- where were you located, or where were you stationed as a polygraph operator?

A In Gaylord, Michigan.

Q And as I understand it, you were employed by the Michigan State Police?

A That's correct.

Q At that time, sir, how long had you been a polygraph operator?

A Ten years.

Q Do you have -- have -- have you had some opportunity, or

-- to look at a file regarding a polygraph you administered on June 2nd, 1988, regarding a James King Anderson?

A Yes, I have.

Q And have you sufficiently refreshed your recollection as to that polygraph?

A I believe so.

Q All right. Do you -- what began your -- your process in --in doing this polygraph, sir?

A A polygraph was scheduled for that date for Mr. Anderson, and he was brought to the polygraph suite by Bruce Gaultier.

Q Do you recall what time they arrived?

A No, but I could refresh my memory.

Q Could you do that, please?

A This test was set for one o'clock, so they most likely would have got there at twelve forty-five.

Q What -- do you have an idea as to what time you first encountered Mr. Anderson?

A Yes.

Q And what time was that?

A 2:08 p.m.

Q And -- and in what context was that, sir? How -- how did that contact come about?

A He was brought to the examination room and sat down, and

we began our conversation about this case.

Q All right. And how did you begin your conversation about this case?

A Well, I got some personal history from him and -- which began at 2:08 p.m., concerning his health and well-being, his educational background, employment, a few other things. And then, at 2:10 p.m., I began reading what's known as the Miranda Warnings.

Q All right. Mr. McMasters, I'm handing you what's been marked as People's Proposes Exhibit Number One. Can you identify that for me, please?

A Yes, this is the form I used to advise Mr. Anderson of his rights.

(At 1:48 p.m., PX#1 identified for the record)

Q All right. That is a xerox or a duplicate copy of the original that is in your file --

A Yes, I --

Q -- Is it not?

A -- I have the original right here.

Q All right. And cou-- could you compare those forms and verify that that is a -- an accurate copy of the original that rests within that file?

(Witness compares PX#1 with form contained in file)

A It is.

Q And, what is the purpose of Proposed Exhibit Number One,

sir?

A This Rights form is used to advise what's known as the Miranda Warning; to tell the person that they have a right to remain silent, that they don't have to say anything, that anything they do say will be used against them in Court. He has a right to have an attorney and if he can't afford an attorney, one will be appointed for him. And then, he has to -- we have to be certain that he understood those rights. And, if he understands them, is he willing to waive those rights and talk to me about the case.

Q All right. Can you tell me specifically, Mr. McMasters, how that form is used? Is it read to him, or...

A It is read to him.

Q All right. Does he -- is he afforded the opportunity to read along with you?

A Yes. He has a copy in his hand while I read this particular form to him.

Q All right. Now, you read the form to him?

A Yes, I did.

Q Okay. And were you satisfied that he understood what you read to him?

A Yes, I was.

Q All right. And he informed you, did he not, that he had been appointed an attorney?

A Yes, he did.
Q And did he give you a name?
A Yes, he did.
Q And what name did he give you?
A Attorney Carey.
Q All right. What did you do after learning that he had an attorney?
A When he advised me that he had an attorney by the name of Mr. Carey, I told him that just because Mr. Carey wasn't present in the building with us, that didn't mean that he didn't have the right to talk to Mr. Carey. And, if at any time he decided that he needed to, or wanted to consult with Mr. Carey, we would stop and we would go to a phone and we would call Mr. Carey and he could counsel with Mr. Carey over the telephone. And, if we couldn't get a hold of Mr. Carey, we would stop the proceeding until he did get a hold of him and did have the opportunity to talk to Mr. Carey.
Q All right. Where did this -- where was this polygraph exsca-- examination scheduled to take place, sir?
A In Gaylord.
Q Is that where it took place?
A Yes.
Q And in -- and at what facility?
A 810 South Otsego, which is a combination Fire Marshall

office complex and polygraph.

Q When you had this conversation about Miranda rights with Mr. Anderson, was anyone else present in the room?

A No.

Q What happened after you had the conversation with Mr. Anderson about his rights to have access to an attorney?

A Well, he advised me that he understood all these rights and he advised me that he was willing to waive these rights and talk to me about the case.

Q Okay.

A And then he -- I had him sign the -- the form.

Q And if -- if I'm not mistaken, your signature also appears on that form.

A I signed it and he signed at 2:16 p.m.

Q All right. And my understanding is, 'my watch' on there means that you were looking at your own watch.

A My own watch.

Q And this is June 2nd, 1988.

A Right.

Q All right.

MR. MACKLEY: Your Honor, I would ask that People's Proposed Exhibit One be entered into evidence.

THE COURT: Ms. Margosian?

MS. DAGHER-MARGOSIAN: I'm sorry. No objection, your Honor.

THE COURT: Thank you. That's admitted.

(At 1:52 p.m., PX#1 admitted without objection)

MR. MACKLEY: Thank you, your Honor.

BY MR. MACKLEY, CONTINUING DIRECT EXAMINATION:

Q Can you tell us, sir, what ti-- what time -- or, what happened after you completed this form?

A Then, I asked him to tell me his side of the story concerning this case, and we began doing that.

Q Is that --

MS. DAGHER-MARGOSIAN: Your Honor --

MR. MACKLEY: -- what --

MS. DAGHER-MARGOSIAN: -- at this po-- excuse me, your Honor. I'm going to just an -- if we're -- I'm anticipating that we're going into the content of the polygraph and I think that's outside the scope of the remand from the Supreme Court. I don't think we really have to go any farther unless it has to do with the pre-test Advice of Rights. That's really all the Supreme Court remanded for.

THE COURT: Mr. Mackley.

MR. MACKLEY: I -- I'm simply trying to get a time frame, Judge. I'm going to ask just a few more questions about it and then I'll move on to something else.

THE COURT: I don't anticipate that there's any difficulty from the defense point of view with him

establishing a time frame. I think that the objection is probably well taken --

MR. MACKLEY: Can --

THE COURT: -- that we don't need to know about the content unless there's something during the course of the examination that would bear upon the rights, again, you see --

MR. MACKLEY: I'll --

THE COURT: -- but I don't know that.

MR. MACKLEY: In that respect, may we approach?

THE COURT: Yes.

(At 1:43 p.m., bench conference held on the record, not recorded)

(At 1:44 p.m., bench conference concluded)

THE COURT: I think we understand where we're headed here, now. I will sustain the objection for the record.

MR. MACKLEY: Thank you, Judge.

BY MR. MACKLEY, CONTINUING DIRECT EXAMINATION:

Q Mr. McMasters, when you indicated that the Defendant started to tell you about his side of the case, was the polygraph machine running at that point?

A No.

Q All right. So, you had a preliminary conversation?

A That's correct.

Q Do you know what time that began and ended?

A I don't have it recorded on here. I -- I can tell you that we started the polygraph examination at 3:19 p.m.

Q And approximately how long did the polygraph examination last?

A We would have concluded at approximately 3:42 p.m.

Q All right. And in -- during the course of your examin-- your initial discussion with Mr. Anderson, did he at any time stop you and request to consult with His-- with Mr. Carey or any other attorney?

A No.

Q All right. And during the course of the polygraph, which began at approximately 3:19, and ended at 3:42; did Mr. Anderson stop you, at all, and request to consult with Mr. Carey or any other attorney?

A No.

MR. MACKLEY: That's all I have of this witness, Judge.

THE COURT: All right. Ms. Margosian.

CROSS-EXAMINATION

BY MS. DAGHER-MARGOSIAN:

Q Mr. McMasters, you've said that when the Defendant advised you that he had a lawyer, you then told him, "We can call your lawyer and you can talk to your lawyer before we continue." Is that correct?

A Yes; that he could stop and -- the proceedings until he

consulted with his attorney, whether it was by phone or whether he got a hold of him personally, or however we made the arrangements.

Q Okay. That was the extent of the rest of your discussion concerning his attorney. Is that correct?

A Yes.

Q Okay.

MS. DAGHER-MARGOSIAN: I have no more questions, your Honor.

THE COURT: Do you have anything further?

MR. MACKLEY: No, Judge.

EXAMINATION

BY THE COURT:

Q Was there any post-test interview with the Defendant? And, I'm not looking for the substance of the interview. What I'm looking for is: Was there any additional time that you spent with him before he was released?

A In this particular case, there would have been a few minutes that I would have advised him that in my opinion he was not being truthful to the issue and I would have given him an opportunity to tell me what the truth was.

Q Do you have a note or recollection as to the -- the time at which you terminated the procedures, all together, and he was released back to Deputy Gaultier?

A I have -- I don't have that noted here.

Q All right.

THE COURT: Did you have anything further?

MR. MACKLEY: No, Judge.

THE COURT: Did you have anything further?

MS. DAGHER-MARGOSIAN: Just one further question, your Honor.

RECROSS-EXAMINATION

BY MS. DAGHER-MARGOSIAN:

Q Mr. McMasters, when you found out that he had a lawyer, I'm understanding that you -- you certainly said, "We can call your lawyer, or stop at any time if you want to talk to your lawyer." Did you caution the Defendant at all, or affirmatively tell him of the dangers of proceeding without a lawyer, or did you go into it in any sort of affirmative way?

MR. MACKLEY: Judge --

THE WITNESS: No.

MR. MACKLEY: -- before he answers, I'm -- I'm going to object as to the relevance of whether he would have advised him as to any dangers. I don't know that he would have had a duty.

THE COURT: Well, that seems to be a sixty-four thousand dollar question, here, given these cases.

MS. DAGHER-MARGOSIAN: I'm just asking, your Honor, what Mr. McMasters did. I'm asking what happened, which

is, I think, exactly what we were remanded here to do.

THE COURT: I'll -- I'll -- I'll permit it. You can answer the question. Your answer was, "No.", I think.

THE WITNESS: That's correct.

THE COURT: All right. Anything else?

MS. DAGHER-HARGOSIAN: Nothing more, your Honor.

MR. MACKLEY: No, Judge.

THE COURT: Thank you. Is this witness released then, from --

MR. MACKLEY: As far as I'm concerned, Judge, he is.

THE COURT: Thank you, sir. Now, we don't have any original document from your file that you need?

THE WITNESS: No.

THE COURT: All right. Thank you, sir. You're --

THE WITNESS: All set?

THE COURT: -- You're free to go.

THE WITNESS: Thank you.

THE COURT: Yeah.

(At 2:00 p.m., witness excused)

THE COURT: Next witness?

MR. MACKLEY: May I have just a moment, Judge?

THE COURT: Sure.

MR. MACKLEY: Your Honor, the next wit-- the next witness that the People have is Staff Sergeant, Bruce Gaultier.

THE COURT: All right. Have you called him?

(Mr. Hackley retrieves Sergeant Gaultier from lobby)

THE COURT: If you would please come before the clerk, Sergeant Gaultier, and raise your right hand, sir, and she'll swear you as a witness.

COURT CLERK: You do solemnly swear or affirm that the testimony you shall give in this matter now pending, will be the truth, the whole truth, and nothing but the truth, so help you, God?

SERGEANT GAULTIER: I do.

THE COURT: Thank you, sir, and you may have a seat.

STAFF SERGEANT BRUCE GAULTIER

called on behalf of the People at 2:01 p.m., and sworn by the clerk, testified:

DIRECT EXAMINATION

BY MR. MACKLEY:

Q Would you state your name for the record, please?

A Bruce Gaultier.

Q Where are you employed, sir?

A The Kalkaska County Sheriff's Department.

Q In what capacity are you employed there, today?

A Staff Sergeant assigned to the Detective Bureau.

Q Was that your assignment, or rank, in June of 1988?

A Yes. Well, I was a Detective/Sergeant at that time.

Q All right. You are the officer in charge of the

investigation with the Kalkaska County Sheriff's Department with the case of the People versus James King Anderson?

A That's correct.

Q When did you first have occasion to begin investigating this case, sir?

A I believe it was on the 19th of May, 1988.

Q And how would that -- how would this incident have come to your attention, sir?

A It was a Department of Social Services referral from a Protective Services worker.

Q All right. Now skipping over a lot of what you did; did you ever have a chance to discuss your investigation with James King Anderson?

A Yes.

Q Do you recall the first time in which you did that?

A Yes.

Q And when was that, sir?

A It was May 23rd, 1988.

Q Do you have -- do you know what time of day that your discussion with Mr. Anderson took place?

A It was in the morning hours.

THE COURT: You said May 23rd?

THE WITNESS: Yes.

THE COURT: Thank you.

BY MR. MACKLEY, CONTINUING DIRECT EXAMINATION:

Q And how was that contact made, sir?

A It was during an interview at the Sheriff's Department.

Q Did you arrange that interview?

A Yes.

Q Do you know when that interview began?

A Yes.

Q When did it begin?

A At approximately 9:45, in the morning.

Q And how long did the interview take you, total?

A I don't recall.

Q And what occurred during your discussion of these -- these incidents with Mr. Anderson? What happened first?

A Um --

(Assignment Clerk enters courtroom)

THE COURT: Hang on for a second.

(The Court and the Assignment Clerk confer at the bench)

THE COURT: Thank you. I'm sorry.

BY MR. MACKLEY, CONTINUING DIRECT EXAMINATION:

Q Do you recall what the question was?

A I recall the question. I'm not sure I know the answer.

Q All right. What is the first thing you recall about the interview?

A I advised him of the allegations made by Peggy Beaver,

and found out some background information; confirmed that -- he indicated that he was her natural father, and some background inves-- information as far as how long they had lived together and where he lived now, and so forth.

Q Did the subject of a polygraph ever come up in that interview?

A Yes.

Q Can you tell the Court precisely how that subject arose in your conversation?

A Mr. Anderson brought the polygraph request up to me. He requested that he take one.

Q And what was your response to that, sir?

A Verbally or personally? Personally, I -- it had occurred rather early in the conversation, or the interview, and...

Q How did that effect the interview process?

A Well, it -- it destroys being able to proceed until the polygraph is given.

Q And -- and why is that?

A Well, when he indicates that he wants a polygraph, then he's indicating that he's willing to answer the charges that were made in a -- in a technique that's used quite frequently by law enforcement. By doing that, then, further interviews or continuing that interview is fruitless at that point.

Q All right. Now, that was your personal observation at the time the request was made?
A Yes.
Q What was your verbal response to Mr. Anderson?
A I told him that one could be set up and that -- he had indicated, also, at the time that he wanted to find out who was molesting Peggy and that by taking the polygraph that he could show that it wasn't him, and that he would find out who, in fact, had done that to her.
Q All right. Skipping to the date of the polygraph, sir, when was that set for?
A The polygraph was set for June 2nd.
Q And as I understand what happened, you made that arrangement?
A Yes.
Q With the State Police?
A Yes.
Q And that was at the request of Mr. Anderson?
A Yes.

THE COURT: When did you make that arrangement?

THE WITNESS: Specifically, I don't know what time I called them, but I was made aware of it -- that an appointment had been confirmed, and due to the proximity to the original request date, I believe it was a cancellation that had occurred.

THE COURT: Do you know the date upon which you requested it?

THE WITNESS: I received notice of it two days after the interview with Mr. Anderson. I requested it either on the 23rd, or the 24th.

THE COURT: Okay. You may proceed, Mr. Mackley.

MR. MACKLEY: Thank you, Judge.

BY MR. MACKLEY, CONTINUING DIRECT EXAMINATION:

Q And as I understand it and -- I -- we should cover this before we move on; you arrested Mr. Anderson at the conclusion of your contact with him on the 23rd of May?

A Correct.

Q And he proceeded to be booked and all the normal things that go on?

A Correct.

Q All right. After that contact, when was the next time that you saw Mr. Anderson?

A On the second of June.

Q And that was for the purpose of the polygraph?

A Correct.

Q What happened on -- what was your first contact with Mr. Anderson on June 2nd?

A I had left a message that if he needed a ride that -- to get a hold of me early, and that I could drive him up there. And he did, in fact, need a ride and did contact

me at a prearranged time and we drove to Gaylord together.

Q All right. And you drove --

A Yes.

Q -- a Kalkaska County Police vehicle?

A Yes.

Q Do you recall anything as to what happened on the trip to --

A No, I don't.

Q -- the polygraph?

A No.

Q Do you recall, at all, what time you may have arrived?

A No, I don't. I know it was an afternoon appointment that we had.

Q What happened when you arrived at the site of the polygraph?

A First, I met with Mr. McMasters and he a-- he wanted to know background information about the case.

Q And you gave that to him?

A Correct.

Q Then, what happened?

A Then he took Mr. Anderson into the examination room.

Q And you were not present in that room.

A Correct.

Q Do you know approximately how long the polygraph took?

A Approximately two hours.
Q Do you know approximately what time you might have left -- well, let's go back a minute.
A What -- what was your first contact with Mr. Anderson after the polygraph was concluded?
A I met him in the -- again, in their waiting area and I escorted him out to the car so he could have a ride back to town.
Q All right. Did you have any conversation with Mr. McMaster after the polygraph?
A Yes.
Q Would that have been before or after you took Mr. Anderson to the car?
A Prior to.
Q So, Mi-- Mr. Anderson was there when you were speaking to Mr. McMaster?
A No.
Q Where was Mr. Anderson at the time you spoke with Mr. McMasters?
A I believe he was in the waiting area/common area at their -- in the foyer area of their building. It's not at the State Police Post. It's a private office that they had.
Q What happened in the conversation between you and Mr. McMasters after the polygraph?
A Specifically, --

MS. DAGHER-MARGOSIAN: Now, again, Judge, I'm -- I'm going to just renew my objection concerning getting into the substance of the polygraph, and I believe this would involve hearsay, as well, so I don't think any conversations as to the substance of the polygraph should come in here.

THE COURT: Mr. Mackley?

MR. MACKLEY: I wasn't asking for the substance of the polygraph. That's...

THE COURT: Okay. You were asking him about his conversation with McMasters?

MR. MACKLEY: Right.

THE COURT: Why?

MR. MACKLEY: To determine if he was aware of the result of the polygraph? And I -- I can just ask him that if...

THE COURT: As to that, Ms. Margosian?

MS. DAGHER-MARGOSIAN: As to that, your Honor, I don't -- I don't even see the -- the relevance of the outcome of the polygraph. I don't think it needs to be dealt with. It has nothing to do with the rights.

THE COURT: Mr. Mackley.

MR. MACKLEY: There is alleged a conversation on the way back. If the -- if the Detective is aware of a confession, they obviously don't need to have that

conversation, Judge.

THE COURT: I don't think that there's any question about the fact of the conversation. It took place. I don't understand. Are you -- are you trying to set the stage for the fact that there was a conversation, because we don't --

MR. MACKLEY: Yes. And, if you don't want us to go into --

THE COURT: It's in --

MR. MACKLEY: -- the conversation --

THE COURT: Well, it's in the record.

MR. MACKLEY: All right.

THE COURT: I mean --

MR. MACKLEY: That's fine.

THE COURT: -- it's in the record. They had a conversation. Is there any reason to know why --

MR. MACKLEY: No.

THE COURT: -- they had --

MR. MACKLEY: And, I'll --

THE COURT: -- the conversa--

MR. MACKLEY: -- withdraw the question --

THE COURT: Okay.

MR. MACKLEY: -- if that's --

THE COURT: Thank you.

MR. MACKLEY: -- what you're --

THE COURT: All right.

MR. MACKLEY: -- waiting for me to do.

BY MR. MACKLEY, CONTINUING DIRECT EXAMINATION:

Q After the polygraph, you had a conversation with Mr. Anderson, however. Is that correct?

A Yes.

Q All right. Did his Miranda rights ever enter into the conversation that you had with him?

A Yes.

Q And can you tell the Court precisely in what context that conversation arose?

A When we got to the vehicle in the parking lot at the office for the -- where the polygraph had been administered, I advised Mr. Anderson that I wanted to talk to him on the way back and that -- and asked him if he recalled the rights that -- the constitutional rights that were given to him by the polygraph operator. He indicated that he did.

Q Was there any other discussion about that?

A I told him that -- that they were still in effect, but that I wanted to discuss with him why the outcome might have been what it was.

Q And then you left?

A He indicated to me that he understood those and he wanted to talk to me.

Q All right. And then you left?
A Correct.
Q Did you have any other conversation with Mr. Anderson regarding his Miranda rights --
A No.
Q -- after that time? All right.

MR. MACKLEY: That's all I have, Judge.

THE COURT: Ms. Margosian?

MS. DAGHER-MARGOSIAN: Thank you, your Honor.

CROSS-EXAMINATION

BY MS. DAGHER-MARGOSIAN:

Q You are Detective Gaultier?
A Correct.
Q Detective Gaultier you -- when you were present at the polygraph -- I want the record to be clear. You are a county Sheriff in Kalkaska?
A Correct.
Q Okay. And this was given by a State trooper at the State Police post. Correct?
A It's a -- it's offices rented by the State Police.
Q Okay. It was State Police space by a State Police trooper?
A Yes.
Q Correct. Okay. Now, I want to back up to the -- to the first time that you -- when you spoke with the Defendant.

That was on May 19th, you said, and he came into your office at the Department, right?

A I think I said that I talked to the -- I became aware of this case on the 19th --

Q Okay.

A -- and I think I talked to him on the 23rd.

Q Okay; on the 23rd. Okay. He came to your office. Now at that time, there was an arrest warrant out, wasn't there?

A I think I picked him up downtown. He was walking downtown.

Q Okay. And there was an arrest warrant and you picked him up on that?

A Not initially. I asked him if he'd come to the Department for an interview.

Q But you were aware that there was an arrest warrant?

A Yes.

Q Okay. Before the interview, did -- did you discuss with Mr. Anderson, that there was an arrest warrant out --

A No.

Q -- for him?

A No, I --

Q No?

A -- did not.

Q Okay. And you say that you gave him standard Miranda

rights before the interview?

A No, I did not.

Q Okay; you did not give him standard Miranda rights before the interview. You gave him Miranda rights after the interview had concluded, and you placed him under arrest? Is that correct?

A No, I did not.

Q Okay. When did you give him the Miranda rights?

A I didn't give him his Miranda rights.

Q Okay. Even though you knew that there was a warrant for his arrest, you didn't bring him in and give him the Miranda rights. You brought him in and spoke with him further about the offense. Is that correct?

A (No verbal response)

Q You took him down to the station for an interview, instead of over to the Court for an arraignment?

A Correct.

Q Correct. Okay. And how long -- you said earlier that it was a brief interview. Do you remember just exactly how long it was, or what hours -- between what hours it took place?

A It was approximately an hour long.

Q Approximately an hour long. Okay. Now, at what point did you place Mr. Anderson under arrest?

A At the conclusion of the interview.

Q At the conclusion of the interview. Okay. And --

THE COURT: Let -- let me ask, Ms. Hargosian, just in the same sense that you've been interposing objections, what the value of all this is. There was nothing; as I recall the record and having looked at it since the case came back; from that interview that was permitted into the --

MS. DAGHER-HARGOSIAN: No, there --

THE COURT: -- draw.

MS. DAGHER-HARGOSIAN: -- wasn't, your Honor. That's right, because it wasn't permitted at the first trial. But, what -- what I'm interested in, is the communication of rights and an awareness that a Defendant may or may not have had, at that time, of the importance of counsel and the right to counsel. The actual statements weren't let in at trial, and I don't think they're relevant here.

THE COURT: Right.

MS. DAGHER-HARGOSIAN: But, I do think how the police were communicating with Mr. Anderson, vis-a-vis his right to counsel from the initial interrogation on, is very relevant because, in fact, it goes to their willingness and their awareness to communicate that. And, I'll obviously tie that in, in my argument, because of what I think their burden is.

THE COURT: Well, I'll let you ask the questions that you wish to ask, absent an objection from the People, but my understanding is that we're supposed to look very closely at some very narrow questions, which is whether or not he is the one that requested the polygraph. And if so, did he waive his Sixth Amendment right at the exam. And if he did waive it at the exam -- at the polygraph exam; not at this early interrogation; does it extend to the questioning in the car. Period.

But, you know, I will afford you whatever latitude you'd like. I just -- again, in the same spirit you raised your earlier objections, I want to keep the record to what apparently the Supreme Court is concerned about.

Did you have anything you wanted to say?

MR. MACKLEY: Judge, my understanding is, with respect to that interview; the only thing that's relevant here, is who initiated the request for the polygraph. That information's already been elicited and his Miranda rights at that time -- there are no statements that are at issue with respect to -- to that point.

THE COURT: Well, Ms. Margosian concedes that. I mean, the officer has testified that he didn't give him any Miranda rights, but -- go ahead, now, to the ex--

MS. DAGHER-MARGOSIAN: I think the importance though, Judge, is what a Defendant's perception is in

terms of right to counsel. We're not really talking about Miranda, here. We're talking about right to counsel. And, I think that when you take a citizen una-- unacquainted with the criminal justice system and bring him in. You don't tell him they're under arrest. You do a significant amount of questioning that goes toward the detriment of the client and you don't advise, not only of Miranda rights but of the specific right to counsel.

Had this officer taken him to Court and had him arraigned, he would have had counsel. Because that wasn't done, the Defendant may have perceived that he was at less peril. And I think that's very relevant to what the Supreme Court is looking for, here. We're looking at -- at the rights pre-arraignment, post-arraignment, pre-appointment, post-appointment. And, I think that police actions, by failing to take him in for arraignment, certainly go to the lack of advice of rights all the way through.

MR. MACKLEY: Judge, if I might respond. There was a statement about statements made -- or some questioning to the detriment of the Defendant. There's nothing -- there is nothing to the detriment of the Defendant that was ever brought out in the trial that took place out of that conversation.

THE COURT: Well, everybody agrees to that. And, I

don't think that the scope of the remand order extends to pre-arraignment activity.

MR. MACKLEY: I would certainly agree to that, Judge.

THE COURT: Well, I'm not surprised. Make your record, counsel, but that -- that's my position.

MS. DAGHER-MARGOSIAN: Okay.

THE COURT: All right.

MS. DAGHER-MARGOSIAN: Thank you, Judge. Just for the record, your Honor, I do think this bears very much --

THE COURT: All right.

MS. DAGHER-MARGOSIAN: -- on whether the Defendant initiated the request for polygraph, post-appointment of counsel, or pre-appointment of counsel. And, I think that all of this discussion between Detective Gaultier and the Defendant is very, very relevant to whether the Defendant was advised of the importance of counsel, and the right to counsel. It's a Sixth Amendment question, your Honor, and I do think it's relevant, but I'll refrain from those questions if that's your ruling.

THE COURT: Well, no. I -- I think I've made my position on the record. Now, I want you to be able to elicit the answers that you want so that we don't have to come back here, again.

MS. DAGHER-MARGOSIAN: Right.

THE COURT: I'm just telling you, when I get to ruling on this thing, I don't believe that I'm concerned with that. But, you go ahead.

MS. DAGHER-MARGOSIAN: All right.

THE COURT: All right.

MS. DAGHER-MARGOSIAN: Thank you, your Honor.

CROSS-EXAMINATION CONTINUED

BY MS. DAGHER-MARGOSIAN:

Q Okay. Detective Gaultier, before the -- before the polygraph, there was about a nine day period; from 5/23 to June 2, 1988. And, during that time, you say you made contact with Defendant. How did you do that in terms of arranging the polygraph?

A Left word, I believe, at his residence.

Q Okay. And did you get confirmation from him that he would show up for the polygraph?

A Yes.

Q Okay. And during the time -- between the time that you first talked to him and the polygraph date, he was arraigned in District Court. Correct?

A I believe so.

Q Okay. And -- and of course, you know that he was appointed counsel in District Court, at the arraignment.

A Yes.

Q Okay. Before the polygraph, did you ask the Prosecutor whether the Defendant had been appointed counsel?
A No.
Q No? And did you ask the Defendant whether he had been appointed counsel?
A No.
Q Okay. And, did you -- excuse me. When he arrived at your office for transportation to the polygraph, did you ask him whether he had consulted with counsel about the dangers of a polygraph?
A (No verbal response)
Q No?
A I don't believe so.
Q Or whether he had consulted, at all?
A I don't believe so.
Q Okay. Did you caution the Defendant, at all, before the ride to Gaylord, about possible dangers of a polygraph?
A No.
Q Okay. And you didn't talk to him, at all, about the fact that he maybe he should discuss this with his lawyer?
A No.
Q Okay. So moving on, to the polygraph itself. Once you were there, I believe we have testimony that you were in a different room watching it on closed circuit.
A Yes.

Q You did not administer Miranda warnings yourself, personally?

A Correct.

Q Okay. You were driving back to Kalkaska, from Gaylord, and it was sometime later; say between forty-five minutes to an hour; when you and the Defendant began to discuss sexual thoughts that the Defendant may have had about his daughter. Is that correct?

A Yes.

Q Yes.

THE COURT: Can I just clarify that. You -- you used a time frame, there, and that time frame is from what point? From the point they leave the police station, or --

MS. DAGHER-MARGOSIAN: Leaving the --

THE COURT: -- they've been on the road?

MS. DAGHER-MARGOSIAN: -- polygraph site, back to Kalkaska.

THE COURT: Within forty-five minutes to an hour of leaving the polygraph site?

MS. DAGHER-MARGOSIAN: Correct.

THE COURT: Okay. Thank you.

THE WITNESS: I believe it was sooner than that, then.

BY MS. MARGOSIAN, CONTINUING CROSS-EXAMINATION:

Q Sooner than that?
A Yes.
Q Sooner than an hour?
A Yes.
Q Okay. Did you, at the polygraph, discuss with Trooper McMaster that the Defendant had an -- had an attorney, or may have an attorney, or had been arraigned?
A No.
Q No. Okay. During the conversation in the car -- not before you got into the car, but after you got into the car and you're driving back and you're discussing thoughts and statements, as you testified to at trial; did you re-Mirandize him at any point?
A No.
Q Did you discuss his right to counsel at any point in the car?
A Well, I think that's a different question.
Q While driving?
A I believe that in the parking lot, in the car, is where we discussed --
Q In the car --
A -- his prior --
Q -- while --
A -- Miranda --
Q -- sitting still?

A Correct.
Q At that point.
A Correct.
Q So, after you left and you were on --
A Right.
Q -- the way back.
A No.
Q You did not advise him of any rights, further?
A Correct.
Q Okay.

MS. DAGHER-MARGOSIAN: Thank you. That's all I have, your Honor.

THE COURT: Mr. Hackley?

MR. HACKLEY: Just a couple of questions.

REDIRECT EXAMINATION

BY MR. HACKLEY:

Q The Kalkaska County Sheriff's Department doesn't have any polygraph equipment of it's own. Is that correct?
A Yes.
Q And, therefore, it's incumbent upon you to make arrangements with the Michigan State Police to use their personnel and their facilities. Is that correct?
A Yes.
Q Can you tell me mileage wise, how far away from the polygraph site you got when the conversation about the

Defendant's sexual thoughts about his daughter occurred?

A I -- I recall the stretch of roadway. I believe it's approximately fif-- ten to fifteen miles from Gaylord. It's on the cut off road to Mancelona. We were in the curves west of Old 27.

MR. MACKLEY: Thank you, Judge. That's all I have.

THE COURT: Ms. Margosian?

MS. DAGHER-MARGOSIAN: I don't have anything further, your Honor.

EXAMINATION

BY THE COURT:

Q So how long would you estimate the time lapse between the time you spoke with him about his rights again, at the police car in the parking lot, and the time that he made the statement that was admitted at the trial?

A I'd estimate it to be fifteen minutes, or...

Q Fifteen minutes.

A Or maybe less.

Q I'm sorry?

A Possibly less than that.

Q And what, again, was your discussion with Mr. Anderson relative to his rights? With specificity.

A I advised him that I wanted to talk to him further about the incident and what circumstances may have caused the results he obtained from Mr. McMasters; and that being a

police officer and having been arrested, I had to clarify to him that he did not -- that he was not required to talk to me and referred to the statements made by Mike McMasters, when referring to the rights that he'd had given to him earlier. I asked him if he was familiar with those; asked him if he wanted to talk to me.

Q And what was his response to that?

A He indicated that he did.

Q Did he make any response as to his acknowledgment or knowledge of the rights that you were referring to?

A He -- yes, that -- that was -- he did recall that -- the conversation that he'd had with Mr. McMasters and those rights, and then also, he indicated that he did want to talk to me.

Q All right. But you did not specifically articulate each individual right. You simply referred to the rights that Trooper McMasters had informed him of, right?

A Correct.

Q All right. Now, the other thing that I wanted to -- to ask you about is, I'm assuming from what you've said, here, that at the time that you took Mr. Anderson up for the polygraph, that he was not incarcerated.

A Correct.

Q And that you were providing this transportation pursuant to the arrangements that you'd made when you first talked

with him on the 23rd, and the agreement for the polygraph had been arrived at, or the request had been made?

A He was -- he was furnished with the location that the polygraph test would be given, along with the date and time, and additional information that if he needed transportation to that location, that he could contact me well ahead of the appointment time, and he could seek transportation with me.

Q All right. Now, let me ask you about that. You say you talked to him on the 23rd, initially? That was the conversation -- the warrant was outstanding, but not served on him, and you have this conversation over at your office. Right?

A Right.

Q And it's on the 23rd, in the course of the conversation that he says, "I want to take a polygraph."

A Right.

Q And then you had to make arrangements for the polygraph.

A Correct.

Q And had you made the arrangements for the polygraph by the time you concluded your conversation with him on the 23rd?

A No, I had not.

Q Okay. And at what point did you find out when a polygraph would be available?

A I believe it was on the 25th.
Q Two days later?
A Right.
Q And under what circumstances was that, then, communicated to Mr. Anderson?
A A message was left at the residence that he was staying at. I believe that was the Sue Rebone residence at that time.
Q And who left the message?
A I did, myself.
Q Did you speak directly with Mr. Anderson?
A No, I did not.
Q What type of message did you leave?
A I don't recall if -- if I left word with Sue Rebone, or if I left a hand written message at the location.
Q And what was, then, the content of the message?
A That -- I left him the date and time for the appointment for the polygraph examination, and, to contact me prior to that date and time, well in advance if he needed transportation to Gaylord.
Q And in response to that communication, did he, in fact, subsequently contact you?
A Yes.
Q When?
A I don't recall. It was prior to the scheduled polygraph

appointment.

Q Do you know how much in advance of the scheduled polygraph, or how long after you had left the message?

A No, I do not.

Q No recollection?

A No.

Q Do you remember how it was he contacted you?

A No, sir.

Q You don't know if it was by phone, or in person, or otherwise?

A Correct.

Q All right.

THE COURT: Additional questions, Mr. Mackley?

MR. MACKLEY: No, Judge.

THE COURT: Ms. Margosian?

RECROSS-EXAMINATION

BY MS. MARGOSIAN:

Q Sergeant Gaultier, when you were in the car, did the Defendant indicate to you that he wanted to talk to you any further, or did you indicate to him that you wanted to continue talking to him?

A He indicated to me; in a response to my indication to him that I wanted to further the conversation; that he was willing to do so.

Q And, I just want to ask you about your testimony at

trial. In your testimony at trial, Sergeant Gaultier, you testified that he had been advised of his Miranda rights about an hour earlier that day. You stated that three times during this course of the testimony; that he had been advised by Mike McMasters during that polygraph, that it was about an hour before you were questioning him about the disputed statement. Would that change your testimony at all, here, today?

A Which part?

Q Well, that -- that it was a very short time from the end of the polygraph until the disputed statement was made in your car? Here it says, "...an hour...".

MR. MACKLEY: Judge, I'm going to object. I'm gonna -- if she's gonna impeach him with a statement, I think she has to show it to him.

MS. DAGHER-MARGOSIAN: I'm not sure that's true anymore, your Honor.

THE COURT: No, I don't believe it is.

THE WITNESS: I believe that the question we talked about earlier was the time after I had discussed the statement he made with Mike McMasters and the time that he made the statement.

BY MS. DAGHER-MARGOSIAN, CONTINUING RECROSS-EXAMINATION:

Q Okay. Well, then, maybe --

A I think --

Q -- we can --

A -- earlier today that was my understanding of --

Q Okay. Maybe we can clarify then, because I think there was some confusion. From the time of the end of the polygraph exam until you had the conversation with him in the car concerning sexual thoughts about his daughter; that was approximately an hour, correct?

A Correct.

Q Thank you.

MS. DAGHER-MARGOSIAN: I have nothing further, your Honor.

THE COURT: All right. May this witness step down, or do you have something further?

MR. MACKLEY: Just one question.

THE COURT: All right.

FURTHER REDIRECT EXAMINATION

BY MR. MACKLEY:

Q It could have been less than an hour, though. Is that correct? You said, "approximately".

A Yes.

MR. MACKLEY: That's all I had, Judge.

THE COURT: Ms. Margosian?

MS. DAGHER-MARGOSIAN: Nothing further, your Honor.

THE COURT: You may step down, sir. Thank you.

(At 2:36 p.m., witness excused)

THE COURT: Your next witness?

MR. MACKLEY: Thank you, Judge. The People would next call Robert Carey, and I'll go get him.

THE COURT: You can remain, now, if you wish, or if you have other things, you may do those, too.

(Sergeant Gaultier remains and sits at counsel table)

THE COURT: Mr. Carey, if you'll please come before the Clerk and raise your right hand, sir, she'll swear you as a witness.

COURT CLERK: You do solemnly swear or affirm that the testimony you shall give in this matter now pending, will be the truth, the whole truth, and nothing but the truth, so help you, God?

MR. CAREY: Yes.

THE COURT: Thank you. You may have a seat, here.

MR. MACKLEY: Thank you, Judge.

ROBERT CAREY

called on behalf of the People at 2:36 p.m., and sworn by the Clerk, testified:

DIRECT EXAMINATION

BY MR. MACKLEY:

Q Would you state your name for the record, please?

A Bob Carey.

Q Where are you employed, sir?

A I'm an attorney.
Q Are you self-employed, as I understand?
A That's correct.
Q Where is your office?
A Kalkaska.
Q Did you, at one time, represent a James King Anderson, the Third?
A Yes, I did.
Q And do you recall how you were called upon to represent Mr. Anderson?
A I was appointed by the Court.
Q I hand you what's been marked as People's Proposed Exhibit Number Two, and ask if you can identify that for me, please.
A No. This isn't something that I normally see. This is in the Court file. That's what the Judge makes out on the bench when he -- at the arraignment. I wouldn't get a copy of this.
(At 2:37 p.m., PX#2 explained by the witness)
Q Did you -- you never got a copy?
A No.
Q All right. Have you ever seen a copy of that, before?
A No.
Q All right. Do you have a recollection as to when your first contact with the case was? Not necessarily Mr.

Anderson, himself, but the case.

A Yes. I have my file with me. If I may --

MR. MACKLEY: I have no objection, if the defense counsel doesn't object, Judge.

MS. DAGHER-MARGOSIAN: I have no objection, your Honor.

THE COURT: Thank you. You may look at your file.

(Mr. Carey reviews file at witness stand)

MR. MACKLEY: Can we approach, Judge, while he's --

THE COURT: Sure.

(At 2:39 p.m., bench conference held on the record, not recorded)

(At 2:39 p.m., bench conference concluded)

THE COURT: Thank you, Judge. For the purposes of this hearing, it's my understanding that counsel can stipulate that the date of arraignment in this matter was May 26th, of 1988, in front of the Honorable E. Patrick Murray. And, it's further stipulated that Mr. Carey was appointed by the Court at that time to represent Mr. Anderson.

THE COURT: Ms. Margosian?

MS. DAGHER-MARGOSIAN: Oh, I'm sorry.

THE COURT: That is your agreement?

MS. DAGHER-MARGOSIAN: Yes, it is our agreement, your Honor.

THE COURT: Yes, the -- the full record before the Supreme Court reflects those documents in the District Court file and the Circuit file, so that -- that's a part of the record. Thank you. You may proceed.

MR. MACKLEY: Thank you, Judge.

BY MR. MACKLEY, CONTINUING DIRECT EXAMINATION:

Q When was your first contact with this case, Mr. Carey?

A I have a letter in my file dated June 1st, addressed to Mr. Anderson and indicating that I have been appointed as his attorney at that there's a pre-preliminary hearing conference scheduled for June 2nd.

Q And presumably, you would have had notice of your appointment prior to June 1st, or on June 1st?

A Yes.

Q And do you recall how that notification would have been received?

A It came to me in the form of a petition -- a copy of a petition and order for court appointed attorney.

Q And when is that dated?

A May 26th, 1988.

Q All right. And that's from the 87th District Court?

A That's correct.

Q Did you attend the pre-preliminary hearing?

A Yes, I did.

Q And who was -- who was involved in that?

A Michael Michalak, who was the Prosecutor, and myself, and that would have been on June the second.
Q Do you know at approximately what time that would have occurred?
A During the day?
Q Yes.
A I don't recall.
Q Do you --
A Probably the morning.
Q All right. Do you know what was discussed at that hearing?
A (No verbal response)
Q Let's put it this way; was there a polygraph discussed?
A No.
Q All right.
A Well -- let me -- let me retract. I don't recall.
Q All right. And you don't have any notes that reflect that a polygraph had been scheduled, or had taken place?
A Nothing in my files regarding a polygraph.
Q All right. What happened with respect to your involvement in this case after that meeting with the Prosecutor?
A In looking back over this, there was a long weekend in between. I filed my appearance; did the usual things; wrote a letter to Mr. Anderson asking him to contact me. He did schedule an appointment for June 6th, 1988, in my

office.

Q And did you meet with him on June 6th of 1988?

A Yes, I did.

Q In your office?

A Yes, I did.

Q All right. And did you begin to discuss the case with Mr. Anderson?

A I went through his personal background first, which is the normal way I do it. And then we started getting into the facts, and as soon as we got into the facts, I knew I was in a conflict of interest.

Q And the nature of that conflict was because you had represented someone in the Probate Court regarding a similar incident?

A Right.

Q All right. And subsequently --

A I was -- I was, in fact, representing somebody. That was a continuing matter in the Probate Court.

Q All right. In the Kalkaska County Probate Court?

A Yes.

Q And subsequently, you filed a motion to withdraw based on your discovery of that conflict?

A Yes, I did. I told Mr. Anderson right -- in fact, it's written in my notes that there is a conflict there -- that it was an inherent conflict, and I knew it was a

problem that could not be surmounted and that I would have to withdraw. And, I didn't take any further notes in the case.

Q And the order you submitted, withdrawing from the case, was entered on June 15th, as I -- as I understand it. Is that correct?

A On the 6th, I called Debbie Hale, who was the magistrate at the time. I advised her of the conflict, and advised her that we needed a new attorney to be --

THE COURT: You've got to --

THE WITNESS: -- appointed.

THE COURT: -- speak up a little bit, Mr. Carey.

THE WITNESS: Advised her that we needed a -- another attorney appointed. And, my notes indicate that on June 10th, I made a motion to withdraw, which was granted.

MR. MACKLEY: That's all I have, Judge.

THE COURT: Any questions, Ms. Margosian?

MS. DAGHER-MARGOSIAN: Just a couple, your Honor.

CROSS-EXAMINATION

BY MS. MARGOSIAN:

Q Mr. Carey, did anyone from the Police Department contact you concerning a polygraph?

A No.

Q Did anyone contact you to advise you that a polygraph for

Mr. Anderson had been scheduled?

A No.

Q Okay. Now, you say that you sent a letter to the Defendant. Do you have that letter in your file?

A Yes, I do.

Q In that letter, do you advise him not to talk with Police, or take polygraphs? Do you caution him as to those investigative things, at all --

A No.

Q -- in your letter?

A No. The letter strictly informs him of the appointment, the hearing date, and that is all.

Q Okay. Thank you. Did you do anything at all on this file until June 6th?

A Filed an appearance of counsel; demand for jury trial and evidence; met with the Prosecutor, as I said, and that is all.

Q Okay.

MS. DAGHER-MARGOSIAN: I have no other questions. Thank you.

EXAMINATION

BY THE COURT:

Q You say the pre-preliminary hearing was on 6/2?

A Yes, your Honor.

Q And your client wasn't present?

A No.
Q It was just a meeting with you and the Prosecutor?
A That's right.
Q It's not a meeting in court?
A No.
Q Okay.

THE COURT: Anything else, Mr. Hackley?

MR. HACKLEY: No, Judge.

THE COURT: Ms. Margosian?

MS. DAGHER-MARGOSIAN: Nothing, your Honor.

THE COURT: Thank you, sir. You're free to go.

MR. HACKLEY: May the witness be excused, Judge?

THE COURT: I'm sorry. Yes.

(At 2:46 p.m., witness excused)

THE COURT: Any other witnesses?

MR. HACKLEY: May we approach?

THE COURT: Yes.

(At 2:46 p.m., bench conference held on the record, not recorded)

(At 2:47 p.m., bench conference concluded)

THE COURT: I understand from counsel that there are no other witnesses to be presented in the case?

MR. HACKLEY: That's correct, Judge.

MS. DAGHER-MARGOSIAN: Yes.

MR. HACKLEY: I'll bring Mr. Kipley in and you can

release him.

THE COURT: All right.

MS. DAGHER-MARGOSIAN: That's correct, your Honor.

THE COURT: All right. Thank you. That being the case, I will release Mr. Kipley. And, then, I need to take a conference call and then we'll come back and hear the arguments of counsel.

(The Assignment Clerk enters the courtroom)

THE COURT: I'll be right there. Mr. Kipley, the lawyers have determined there's no need for your testimony, so I release you from any subpoena.

MR. KIPLEY: Okay. Thank you, Judge.

THE COURT: Thank you for your attendance, sir.

MR. KIPLEY: Thank you.

(At 2:48 p.m., Mr. Kipley released by the Court)

COURT OFFICER: All rise, please.

(At 2:48 p.m., Court in recess)

(At 3:19 p.m., court reconvened, all parties present)

COURT OFFICER: All rise, please.

THE COURT: Thank you. You may be seated. I'm sorry for that delay. Do you have anything by way of a closing argument, or statement, Mr. Hackley?

MR. MACKLEY: No, I don't, Judge. I believe we've fulfilled the requirements set forth in the order from

the Supreme Court dated March 25, 1994.

THE COURT: Okay. Ms. Margosian?

MS. DAGHER-MARGOSIAN: Your Honor, I -- I want to stress that I think that what this hearing is about, is whether the Defendant had right to counsel during the Police interrogation on this case. We had a bit of an exchange about whether it was relevant that Detective Gaultier was interrogating the Defendant prior to arrest.

What I think was very important about that was that it sets the tone for the rest of the interrogation that took place in this case. To say that it -- that it isn't relevant, may be technically true, but it's -- I believe it's blinding ourselves to the context and totality of the circumstances that took place here.

Now, what I also think is very important is that within that nine day period, there was an intervening event. And, the intervening event was that the Defendant was appointed counsel. From that point on, the slate was clean and initiations that took place after that time are relevant within the context of when counsel was given to the Defendant. Thus, the fact that Detective Gaultier was calling Defendant to arrange this polygraph, leaving messages, getting things ready; constitutes initiation on the part of the Police, post-appointment of counsel.

I think that this is an absolute violation of the

cases cited by the Supreme Court. It's an absolute violation of Bladel (After Remand); absolute violation of Michigan v Jackson.

I think it's also very, very important that there was an arrest warrant out for this offense, and I think we need to be clear. The record will show that it wasn't for drunk driving, or something. It was for this offense -- at the date Detective Gaultier picked up Defendant; in his own words; had him come to the station, and talked with him.

Whether someone volunteers to take a polygraph, is very different when they know that there's an arrest warrant out for them, than if they don't know that there's an arrest warrant out for them. And, what happened here was Police conduct that involved withholding that information in order to elicit incriminating statements from the Defendant. If the Defendant initiated the polygraph, it's arguable that it was only initiated because he didn't know that there was an a warrant -- a warrant out for him. And, I think that that is highly relevant to the total analysis in this case.

I think, secondly, I would argue that it's been shown Detective Gaultier did initiate as to this polygraph, post-appointment of counsel and that's the very narrow consideration that Bladel (After Remand) speaks

of.

I think that we need to think about the initiation question in terms of a continuing question. I think that if we limit ourselves to merely looking at who spoke first; the Defendant or the Police; you're getting into a very, very limited analysis. And, I don't think that that's what these cases stand for.

If I would cite the Court, I'd cite the Court to People v Bladel (After Remand), page 63, where the Court discusses the inequality in Police and Prosecutors and the Judiciary, versus an uninformed Defendant. And, the Court there says, "The simple fact that a Defendant requests an attorney indicates he does not believe he's sufficiently capable of dealing with his adversaries on his own."

That's exactly what we have here. So, the question of who spoke first is certainly not dispositive. Once the Defendant was taken to the polygraph, this hearing has established that additional cautions were not given. Certainly, the burden was placed on the Defendant. "Oh, if you feel uncomfortable, we'll stop." Those are standard Miranda types of warnings that are given, and that's perfectly fine and acceptable procedure.

However, our position is that the Sixth Amendment right is separate from, and subject to a much higher

standard.

THE COURT: Well, doesn't --

MS. DAGHER-MARGOSIAN: And --

THE COURT: -- doesn't Patterson versus Illinois say that that's not right.

MS. DAGHER-MARGOSIAN: Let's get to Patterson versus Illinois. Patterson versus Illinois, I think, is kind of a red herring, here. If you look at footnote three of Patterson versus Illinois; in that particular case, that Defendant did not have counsel while the interrogation was taking place. Counsel had not been accepted, or retained. There was no appointment of counsel in place. And in that regard, I think Patterson is totally distinguishable.

What we've got here is a Defendant that was interrogated, polygraphed, and questioned after the polygraph all the while having counsel, or at least for two-thirds of that time. That's very distinct from Patterson which on it's face, superficially, looks damaging to our position. It's not. It's totally distinguishable from our position, because in our case, the Defendant --

THE COURT: Well, what I --

MS. DAGHER-MARGOSIAN: -- had counsel.

THE COURT: What I find to be of interest in Patterson, of course, is the Court's discussion of the compre-

hensiveness of rights given under the Fifth Amendment as they implicate Sixth Amendment rights, which is in contradistinction, I think, to the earlier Supreme Court case -- what's the Michigan case?

MS. DAGHER-MARGOSIAN: The Michigan case?

THE COURT: The one --

MS. DAGHER-MARGOSIAN: Michigan v Jackson.

THE COURT: Right. Right. I mean, they do seem to be drawing some real distinctions in Jackson that they back away from in Patterson.

MS. DAGHER-MARGOSIAN: But they don't make clear distinctions, and they certainly say that if you're appointed counsel, you have full Sixth Amendment rights and that would indicate that Michigan v Jackson is governing. Patterson is not controlling here, because he did not have counsel appointed at that time. You know, maybe, in future cases that will happen, but that hasn't happened yet. And, I think that we're governed, certainly, by those earlier rulings.

I think another thing that -- that was very important is that the Prosecutor apparently was not made familiar with the polygraph arrangements. We had the trial attorney here, saying, "I wasn't ever informed. June 2nd, when I showed up for a..." -- I guess it's called a Pre-Pretrial -- "...I wasn't informed. I had no

knowledge that any sort of polygraph arrangements were being made, or that a polygraph was given discussed or administered."

I think that is very representative of the way that this initial investigation was done. It was done without informing the Prosecutor, so that he could properly inform his adversary, and that's exactly what these cases do not allow. The Sixth Amendment right -- and I know the Court has studied these cases and read these cases. The thrust of them is that the Sixth Amendment right is separate from, and more important than the general Fifth Amendment rights.

Why? Because I -- I think in People v Leonard, which is in the same volume, I think as Bladel (After Remand), it says, "Without the Sixth Amendment right, the Fifth Amendment rights have no importance or relevance, whatsoever."

We move on to the segment of our testimony that concerned the conversation in the -- in the car. And, I've argued that up and down for five years. I think it's rather clear that a second set of warnings needed to be given; not just Miranda, but a clear Sixth Amendment caution.

In this particular case, Detective Gaultier said, "I want to re-initiate some discussions with you. Do you

remember your rights?" That was an initiation. There was a drive. At trial, he testified that there was questioning; and I know the Court can take judicial notice, both of the transcript and sitting there; there was questioning. This statement, then, was brought up, and there was absolutely no discussion of right to counsel.

Now, there's no question that any experienced Police Officer knows that counsel had been appointed and up on the stand, today, Detective Gaultier indicated that he, indeed, knew that counsel had been appointed. So, I think it's very clear that even after the polygraph, a substantial appeared time elapsed. Two officers from two different departments were participating. I don't think that those initial polygraph warnings can be construed to carry over to that conversation in the car.

And, even if they were -- even if this Court found that they were, the only kind of warnings given to the Defendant at the polygraph by McMasters, were Fifth Amendment rights -- rather standard Fifth Amendment rights. And, "If you're uncomfortable, we'll stop." There was no significant caution.

THE COURT: But is that what Patterson versus Illinois permits?

MS. DAGHER-MARGOSIAN: I think that's the edge of

Patterson versus Illinois, your Honor, but once again, in Patterson there was no counsel appointed. Here, there was. And, counsel had been appointed for some time.

THE COURT: Okay. I'll agree with that. But, the man was indicted in Patterson. He didn't have a lawyer. Here, he's arraigned. There is a lawyer appointed to him with whom he hasn't met, but he's able to tell the polygraph operator, "Here's my lawyer's name.", in response to a specific question, or something. "Do you have a lawyer?", or, "You have a right to a lawyer." "Well, I've got a lawyer. Here's his name." "Well, if you want to talk to your lawyer, then we'll stop until you talk to your lawyer." The man says, "No. I don't want to do that."

MS. DAGHER-MARGOSIAN: Right. That's what the testimony showed, but what I think is operative is the kind of -- of language in Bladel (After Remand), "Unless a Defendant has spoken to a lawyer...". When the only individuals he has spoken to have been from the police community, how can the Defendant know how serious it is to take a polygraph, at all? The business of police is to elicit incriminating statements.

Certainly, the burden is on police to make known, at least through the Prosecutor, but probably to the defense lawyer, "We want to conduct a polygraph on your client."

and -- and that is really, in my view, where this case rests. And, I think that is distinguishable and extends well beyond Patterson. I think this is -- is offensive to the point where this Court and the higher Courts really can't countenance it, and it -- it colored and tainted the rest of the -- the proceedings because that statement came in.

THE COURT: Does it make any difference in this case, unlike Patterson, that his statement is really exculpatory in nature, as opposed to very incriminating in Patterson?

MS. DAGHER-MARGOSIAN: I don't -- I don't think that any -- this came up at the Supreme Court, and the Prosecutor tried to argue it and although we don't have a record of that, the responses of the Justices, including Patty Boyle, was, "That's ridiculous that it wasn't a harmful statement." That --

THE COURT: Okay.

MS. DAGHER-MARGOSIAN: I mean, my view and -- and the view of the Justices in -- I guess we could debate it, but I think it was a very harmful statement.

THE COURT: Okay.

MS. DAGHER-MARGOSIAN: That would conclude my remarks, your Honor.

THE COURT: Okay. Well, I appreciate the argument.

In my view, these decisions are decided and determined on the margins of the existing law. This thing has been sent back to me, as I understand my obligation, to determine facts relating to the questions posited to me by the Supreme Court and I don't want to attempt, from the bench, a factual recitation based upon this testimony, even though it was very brief, because I don't want to leave something out or misstate something. So, I'm going to have to take it under advisement and issue an opinion which I will attempt to do, forthwith, as soon as I have the opportunity to thoroughly review my notes.

The initial question is, "Did the Defendant initiate the request for the polygraph?" As to that, I think the record is uncontroverted that he did. Now the circumstances under which he did it are arguable as a matter of policy and how that effects the rest of the proceedings and will be good fodder back at the Supreme Court, I'm certain.

But as to that issue, would you take the position, Ms. Margosian, that there's anything in the record to the contrary, but that he initiated the request for the polygraph? I mean, I'd be a happy guy if you said, "No. That's not the way it is, Judge. Find the other way.", because then I'd just send it back, "No, he didn't." But, I think he did, based on what has been testified to.

MS. DAGHER-MARGOSIAN: Well, I think, Judge, as I -- as I've said before -- I mean, I think -- I think it's oversimplifying to say, "Yes, or, No. He initiated the polygraph." He brought it up, but I -- I would submit to you that the initiation that counts for purposes of this case, is the initiation made by Detective Gaultier after the --

THE COURT: Okay.

MS. DAGHER-MARGOSIAN: -- the Defendant received counsel.

THE COURT: Let me try and -- let me -- I -- simply because I don't want to do any work that I don't have to, here, if you've got something persuasive the other way. I've got other things, as I'm sure we all do.

The record is clear, in my view, that Gaultier talked to him; and this is the part that I'm getting nervous about and don't want to do too much of; on 5/23, in the a.m., in the Detective's room at the Sheriff's Department, Kalkaska, Michigan. He's focused on him. A warrant has issued, but not been served on him. He sees him downtown, has him come in for a discussion. That's the scenario. In the course of the discussion, Mr. Anderson says, "I want to take a polygraph.", or, "I will take a polygraph.", or, "Can I take a polygraph?"

Now, what the Supreme Court said to me is, "Judge,

you tell us: Did he initiate the request for the polygraph?" On its black and white face; yes, he did. Was he put in a position to do it by the officers? Sure. But -- but he's the one that initiated the request. So, if I answer that "Yes.", then I have to go on to decide whether or not he waived his Sixth Amendment rights at the examination, and whether or not that extended to the activity in the car, which is what I will undertake to do.

But, do you have any disagreement with my facial observation that the testimony and the record reflects --

MS. DAGHER-MARGOSIAN: Well, until you -- to me, the word 'initiate' here carries a real value. I would agree with your recitation of the facts, Judge.

THE COURT: Okay. That's the way I'm going to put it down, and then I'll go on to the other questions. Okay. Anything else?

MS. DAGHER-MARGOSIAN: No, nothing from me.

THE COURT: Okay. Thank you.

MS. DAGHER-MARGOSIAN: Thank you, Judge.

THE COURT: I'll get this opinion out immediately.

COURT CLERK: All rise.

THE COURT: Thank you. We're adjourned.

(At 3:37 p.m., proceedings concluded)

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STATE OF MICHIGAN)
)
COUNTY OF KALKASKA)

I, Marlene M. Ritter, Official Court Recorder of the 46th Circuit Court, State of Michigan, do hereby certify that the foregoing pages, one through seventy, inclusive, comprise a complete, true and accurate transcript, to the best of my ability, of the proceedings and testimony taken in the matter of the People of the State of Michigan versus James King Anderson, III, File Number 88-905-FC(D), on Thursday, May 12, 1994.

May 15, 1994

Marlene M. Ritter

Marlene M. Ritter, CER-4249
Official Court Recorder
107 South Roberts Road
Grayling, Michigan 49738
(517) 348-7750

No. 94-922

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER Term, 1994

PEOPLE OF THE STATE OF MICHIGAN,

Petitioner,

V

James King Anderson III,

Respondent.

PROOF OF SERVICE

STATE OF MICHIGAN)
) ss.
COUNTY OF INGHAM)

TRICIA A. McNABB, being first duly sworn, deposes and says that on , she filed with this Court the following:

MOTION TO PROCEED IN FORMA PAUPERIS
AFFIDAVIT
BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI
PROOF OF SERVICE

and she mailed one (1) copy of same to:

Prosecuting Attorneys Appellate Service
6520 Mercantile Way, Ste. 2
P. O. Box 30218
Lansing, MI 48909

TRICIA A. McNABB

Subscribed and sworn to before me
January 19, 1995.

KAY M. HAMMING
Notary Public, Ingham County, Michigan
My commission expires: 11/22/98

IDEN NO. rb12158sp
Ronald J. Bretz